

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

**PATENT**

In re Application of	:	Pierrick Guingo et al.
For	:	DISTRIBUTED ARCHITECTURE FOR
	:	REAL-TIME FLOW MEASUREMENT AT
	:	THE NETWORK DOMAIN LEVEL
Serial No.:	:	10/733,393
Filed	:	December 12, 2003
Art Unit	:	2144
Examiner	:	Maceeh Anwari
Att. Docket	:	ALC 3109
Confirmation No.	:	8508

**REPLY BRIEF**

Mail Stop Appeal Brief Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

Sir:

This Reply Brief is submitted in response to the Examiner's Answer mailed on July 10, 2008.

**I. STATUS OF CLAIMS**

Claims 1 and 3-26 are on appeal.

Claims 1 and 3-26 are pending.

No claims are allowed.

Claims 1 and 3-26 are rejected.

**II. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

The following grounds of rejection are presented for review:

- A. Claim 10 is rejected under 35 U.S.C. § 112, first paragraph, as allegedly failing to comply with the enablement requirement.
- B. Claims 22-26 are rejected under 35 U.S.C. § 101 as allegedly failing to fall within a statutory category.
- C. Claims 19-21 are rejected under 35 U.S.C. § 102(b) as allegedly being anticipated by U.S. Patent Publication No. 2002/0145981 to Klinker et al. (hereinafter "Klinker").
- D. Claims 22-26 are rejected under 35 U.S.C. § 102(e) as allegedly being anticipated by U.S. Patent No. 6,751,191 to Kanekar et al. (hereinafter "Kanekar").
- E. Claims 1 and 3-18 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Kanekar in view of Klinker.

### III. ARGUMENTS

The following remarks are directed to the new points of argument raised in the Examiner's Answer mailed on July 10, 2008. In section 10 on pages 14-16, entitled "Response to Argument," the Examiner's Answer sets forth several new arguments in response to Appellant's Appeal Brief. Appellant will respond to each of the Examiner's new arguments in turn.

#### A. Statutory Requirements under 35 U.S.C. § 101

On page 7 of Appellant's Brief, Appellant argues that the system of claim 22 is implemented in computer hardware and includes a number of computer components. In response, page 14 of the Examiner's Answer argues that "the system (including the routers) recited in claims 22-26 is interpreted as being software *per se*." Appellant respectfully submits that the Examiner has misconstrued the claims and misapplied the law.

First, Appellant respectfully submits that the interpretation of the claims by the Examiner is improper. In particular, claim 22, as properly interpreted in light of the specification, recites the necessary physical articles or objects to constitute a machine or manufacture within the meaning of 35 U.S.C. § 101. Furthermore, Appellant respectfully notes that the United States does not currently exclude software *per se* from patentability. Thus, the Examiner has improperly defined the applicability of 35 U.S.C. § 101. More specifically, even assuming, *arugendo* that the claims are properly interpreted as software *per se*, which they are not, such an interpretation would not justify automatic exclusion of this subject matter from patent eligibility under 35 U.S.C. § 101.

B. Inherency of Time Stamps

On page 8 of Appellant's Brief, with respect to the rejection of claims 19-21 under 35 U.S.C. § 102(b), Appellant argues that Klinker is silent regarding timestamps and packet delay. In response, page 15 of the Examiner's Answer argues that Klink inherently discloses this subject matter, as round trip delay time is used by determining "inherently through subtracting the times, or timestamps." Appellant respectfully submits that the Examiner has not properly established the inherency of this subject matter.

As set forth in MPEP § 2163.07(a) and *In re Robertson*, 169 F.3d 743, 745, (Fed. Cir. 1999), to establish inherency, the extrinsic evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. Inherency, however, may not be established by probabilities or possibilities. The mere fact that a certain thing may result from a given set of circumstances is not sufficient. Here, the Examiner has submitted no evidence to support the conclusion that timestamps or packet delays are necessarily present in Klinker and has therefore failed to show the inherency of this subject matter in Klinker.

C. Conclusion

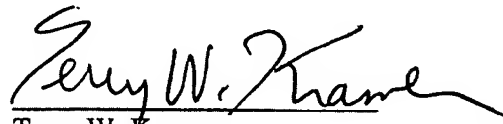
Appellant respectfully submits that the remaining points of argument set forth in the Examiner's Answer are repetitive and were therefore fully addressed in Appellant's Appeal Brief. For the reasons set forth herein and in the Appeal Brief, Appellant respectfully requests that the rejections of the claims under 35 U.S.C. §§ 101, 102, 103, and 112 be reversed.

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Respectfully submitted,  
KRAMER & AMADO, P.C.

Date: August 26, 2008

  
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